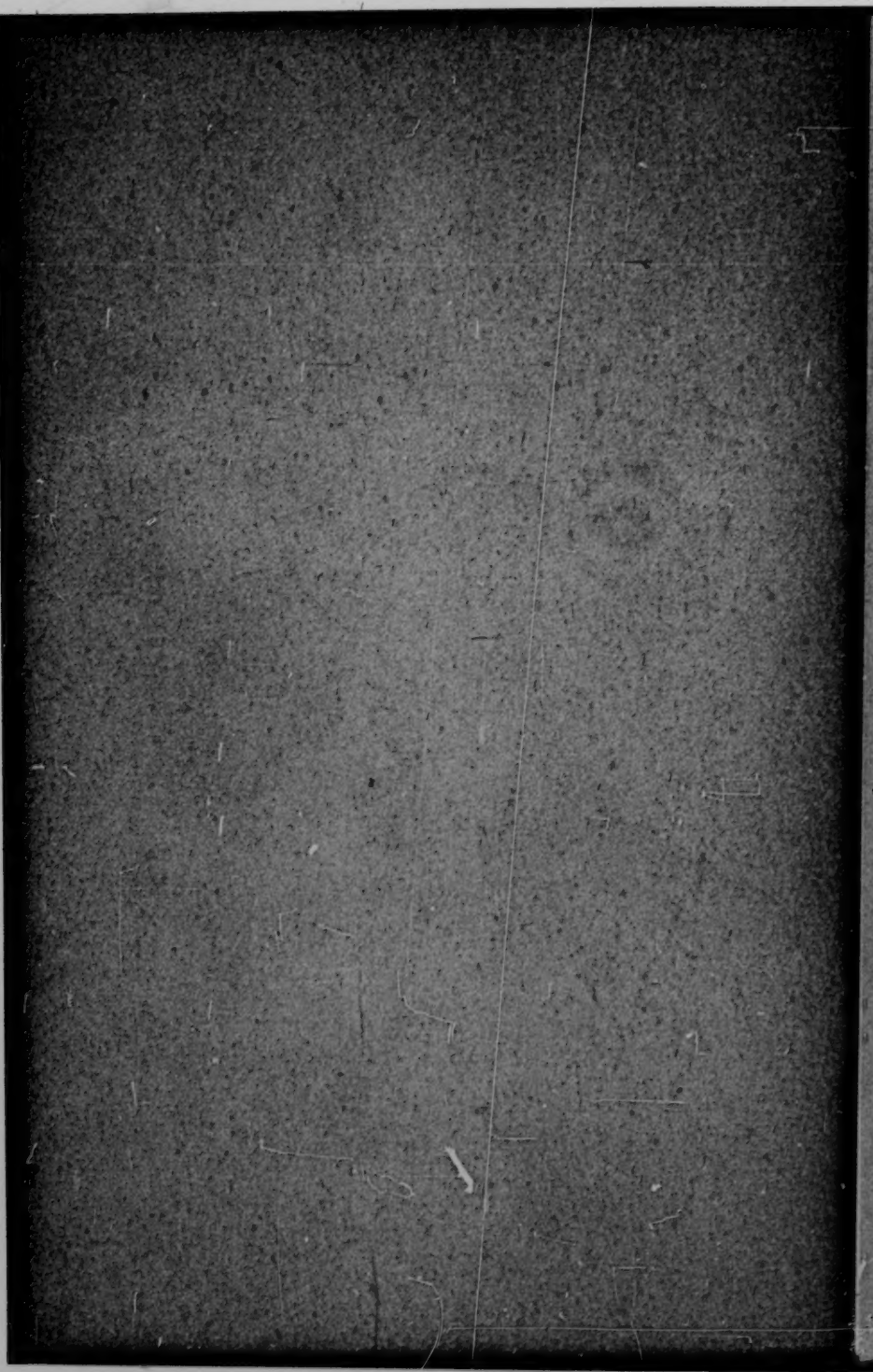

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., APPELLANTS

V.

LT. ROBERT C. BALLARD, U.S.N.
APPELLEE

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PETITION FOR REHEARING

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TABLE OF AUTHORITIES CITED

United States Code, Title 10, Sec. 6015

Pages. . . 2, 3, 4, 5

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The petitioner respectfully presents this petition for a rehearing based on the grounds set forth below.

The gravamen of the majority opinion is that Congress intended the tenurial advantage to women officers in order to com-

pensate them for the "current restrictions on women officers' participation in combat and in most sea duty." (Slip opinion p.10) The majority then cited 10 U.S.C. §6015 which prevents the assignment of women to duty in aircraft engaged in combat missions and their assignment to duty on combat vessels. The majority opinion went on to point out that petitioner-appellee had not challenged these restrictions on women. It is a primary purpose of this petition to clearly challenge those restrictions insofar as they apparently are providing a justification in the minds of the majority for the tenure given to women officers and denied male officers.

If the majority had not thought the lack of a challenge to the validity of 10 U.S.C. § 6015 important, it would not have been mentioned.

The issue of a lack of a challenge to 10 U.S.C. § 6015 was never raised by the government. This writer was never queried on this point at oral argument. It is a tragic situation where an individual is so close to the well earned benefits of retirement yet will be denied [1/] those benefits due to the lack of a challenge to an issue which the petitioner-appellee felt he could not challenge because he was not a woman. That issue is the assumed Congressional justification in denying tenure to male naval officers on the ground that women naval officers cannot serve on combat ships or aircraft. The majority clearly

[1/] Petitioner-appellee made a mistake in his brief at p.29, footnote 23. He cannot retire at 19 1/2 years which occurs on February 16, 1975. He faces discharge without retirement unless he remains in service until August 16, 1975 which will be 20 years of active duty.

bases its opinion on that assumed Congressional motive and anchors its opinion on the lack of a challenge by this petitioner to the propriety of that motive. If the case is to be decided on this basis it should be remanded to the three judge court and the government can then respond to the issue of the constitutionality of 10 U.S.C. § 6015.

CONCLUSION

Neither the briefs nor oral argument discussed the constitutionality of 10 U.S.C. § 6015. Neither majority nor dissenting opinions considered the remedy of a remand of the case to the Three Judge District Court to hear evidence on the constitionality of 10 U.S.C. § 6015 because that section had not been challenged by petitioner who felt himslef unaffected by that section. He will be affected, however, when he is

discharged without retirement after serving faithfully and well for almost 20 years. All this due to a statute which severely restricts women in the form of 10 U.S.C. § 6015 and then the statutory scheme which the majority found Congress to have approved which grants protection to women and not men because of the effect of 10 U.S.C. § 6015.

Sex discrimination against one sex hurts both sexes and this case is a perfect example of that fact.

Petitioner-appellee does not limit himself to the request for a remand in this petition for a re-hearing but moves the Court to consider any and all remedies, including mootness, to reach a just and equitable decision in this case.

Respectfully submitted,

CHARLES R. KHOURY, JR.
Attorney for Petitioner
Robert C. Ballard

ATTORNEYS' CERTIFICATE OF GOOD FAITH

The undersigned Charles R. Khoury, Jr., attorney for petitioner-appellee Robert C. Ballard, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment the grounds of said petition are well taken and in conformance with the Court's Rules, and that said petition for rehearing is not interposed for delay.

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